Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the	)	
Telecommunications Act of 1996:	)	CC Docket No. 96-152
	)	
Telemessaging, Electronic Publishing, and	)	
Alarm Monitoring Services	)	

REPLY COMMENTS OF BELL ATLANTIC

The Bell Atlantic Telephone Companies

By their Attorney

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REPLY COMMENTS OF BELL ATLANTIC[1]

I. Introduction and Summary

Most of the parties to this proceeding agree that the statutory non-accounting provisions relating to telemessaging, electronic publishing and alarm monitoring services are complete and self-executing.[2] They agree that additional Commission-imposed regulatory restrictions are neither necessary nor appropriate.

The few parties that seek to add detailed regulations to the straightforward requirements of the Act are simply trying to prevent local exchange carriers ("LECs") from competing effectively in "their" industry by imposing restrictive rules that are inconsistent with

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[1] The Bell Atlantic telephone companies ("Bell Atlantic") are Bell Atlantic-Delaware, Inc.; Bell Atlantic-Maryland, Inc.; Bell Atlantic-New Jersey, Inc.; Bell Atlantic-Pennsylvania, Inc.; Bell Atlantic-Virginia, Inc.; Bell Atlantic-Washington, D.C., Inc.; and Bell Atlantic-West Virginia, Inc.

[2] ***See*** 47 U.S.C. §§ 260, 274, 275.

the express language of the Act. Some also propose enforcement mechanisms that are guaranteed to swamp the Commission with a multitude of frivolous complaints.

The Commission should resist the temptation to adopt unnecessary rules. It should not shift the burden of proof in complaint proceedings but, instead, adopt streamlined pleading requirements that eliminate the need for protracted discovery. Such procedures will help enable the Commission to reach a decision within the tight deadlines imposed by the statute. In addition, in an effort to avoid frivolous complaints, the Commission should adopt and vigorously apply sanctions similar to those in Rule 11 of the Federal Rules of Civil Procedure.

II. Electronic Publishing

- Application of Section 272

It is undisputed that Bell companies wishing to offer electronic publishing services must comply with the provisions of Section 274. Contrary to the claim of AT&T,[3] however, they need not also comply with Section 272, even if the electronic publishing services are interLATA.[4] AT&T appears to be arguing that, insofar as electronic publishing services include an "interLATA access" component, they must comply with the provisions of both

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[3] Comments of AT&T Corp. ("AT&T") at 3 ("Section 272(a) imposes structural separation and nondiscrimination requirements that apply (1) to any interLATA information service that originates in a BOC's region, including electronic publishing." (emphasis added)).

[4] Section 272 applies to "[i]nterLATA information services, other than electronic publishing." 47 U.S.C. § 272(a)(2)(C) (emphasis added).

Sections 272 and 274.[5] That interpretation would make a mockery of the statutory scheme. Congress specifically included electronic publishing in the definition of information services.[6] It recognized that electronic publishing might be provided on an interLATA basis, because it specifically exempted such services from the separate affiliate provisions of Section 272 that otherwise apply to interLATA information services.[7] Congress then devoted an entire section of the 1996 Act to the requirements that the Bell companies must follow in order to engage in the provision of electronic publishing services, making no distinction between the provision of interLATA and intraLATA electronic publishing services.[8]

AT&T appears to argue, however, that the use of a telecommunications service to carry an electronic publishing service across LATA boundaries somehow makes the electronic publishing offering an interLATA telecommunications service, subject to the separate affiliate requirements of Section 272. Under that argument, all interLATA electronic publishing services would contain an "interLATA access" component and become subject to 272 structural separation pursuant to Section 272(a)(2)(B). But Congress expressly rejected this argument by exempting interLATA electronic publishing services from just those requirements.[9] AT&T's convoluted argument, therefore, is inconsistent with the Act and should be rejected. Instead, the

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[5] AT&T at 2-3.

[6] "The term 'information service' ... includes electronic publishing." 47 U.S.C. § 153(20).

[7] 47 U.S.C. § 272(a)(2)(C).

[8] 47 U.S.C § 274.

[9] 47 U.S.C. § 272(a)(2)(C).

Commission should find that all electronic publishing services are to be regulated only under Section 274, not 272.

- Application of Separation Provisions to Joint Ventures

Time-Warner and MCI likewise want to rewrite the Act. Section 274(b) enumerates nine sets of structural separation requirements applicable to the Bell companies' provision of electronic publishing services. Some explicitly apply to both separated electronic publishing affiliates and joint ventures, while others are limited on their face to separated affiliates.[10] The parties claim, however, that Congress's use of the purely explanatory language requiring the Bell company and the separated affiliate or joint venture to be "operated independently"[11] exhibits an intention to apply to joint ventures even those provisions which on their face do not apply to them.[12] As Time Warner pointed out in another context, if Congress had intended the provisions to apply to joint ventures "it was fully capable of doing so."[13] The

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[10] Provisions in Section 274(b) that apply only to separated affiliates, not joint ventures, are (b)(5), prohibiting officers, directors, employees, and property in common, and (b)(7), that prohibits the Bell operating company from (1) performing hiring and training of personnel for the affiliate, (2) purchasing, installing or maintaining of equipment for the affiliate, and (3) performing research and development for the separated affiliate.

[11] As Bell Atlantic showed in its initial comments, the use of this phrase merely parallels the Commission's own use of that phrase in its own rules, and the Commission has never found that they create additional substantive separation requirements. Comments of Bell Atlantic at 5-6.

[12] Comments of Time Warner Cable ("Time Warner") at 12-13, Comments of MCI Telecommunications Corporation ("MCI") at 4-5.

[13] Time Warner at 19.

fact that Congress included joint ventures in some of the provisions of Section 274(b) and not in others exhibited a clear intention to limit application of the latter provisions to separate affiliates. Moreover, Congress specified an exhaustive and complete list of structural separation requirements. If Congress had intended to allow the Commission to impose additional requirements, "it was fully capable of doing so."

- Joint Marketing

Another set of statutory provisions that Time Warner wants to rewrite are those that address joint marketing. The Act limits the ability of the Bell company to market "for or in conjunction with" an electronic publishing separated affiliate or any other affiliate related to electronic publishing.[14] But it allows, without limitation, a Bell company to "provide promotion, marketing, sales, or advertising personnel and services" to a joint venture.[15] Time Warner would lobotomize this latter provision by prohibiting the Bell company from marketing or selling its exchange services along with a joint venture's in-region electronic publishing services.[16] This, however, is precisely what is permitted. The Act allows the joint venture to contract with the Bell company for promotion, marketing, sales, and advertising services.[17] There is no

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[14] 47 U.S.C. § 274(c)(1)(A) and (B); ***see also*** § 274(c)(2)(A) (which allows the Bell company to provide inbound telemarketing or referral services to a joint venture).

[15] 47 U.S.C. § 274(c)(2)(C).

[16] Time Warner at 25-26.

[17] Under Section 274(b)(3)(B), those contracts must be filed and made publicly available.

prohibition, expressed or implied, on the same Bell company personnel who are engaged in providing such services for the joint venture from engaging in other activities, including marketing or selling the Bell company's services or products, either separately or in combination with the joint venture's electronic publishing services. Congress authorized the Bell companies to sell and market the services of the joint venture to meet the public's demand for one-stop shopping. If Congress had intended to prohibit such activities, "it was fully capable of doing so," as it did in the case of separated affiliates.

Likewise, the statutory language was very carefully written to limit the ability of only the Bell operating companies[18] to promote, market, sell, or advertise electronic publishing services (except those of an electronic publishing joint venture). Nowhere does it restrict a separated affiliate or joint venture from selling the Bell company's services, contrary to Time Warner's claim.[19] Nor is there any statutory provision that precludes any other affiliate that is not owned or controlled by the Bell operating company, such as the parent holding company and its non-Bell operating company subsidiaries, from marketing the services of both the Bell company and an electronic publishing affiliate or joint venture. The Commission should reject AT&T's unsupported contention that such arrangements are barred.[20]

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[18] For the purpose of Section 274, the term "Bell operating company" is defined in the Act to encompass both the existing operating telephone companies and their successors and assigns that provide wireline telephone exchange service, 47 U.S.C. § 153(4), and any entity, other than an electronic publishing joint venture, that is owned or controlled by any such company, 47 U.S.C. § 274(i)(10).

[19] Time Warner at 25-26.

[20] AT&T at 17.

There are also no statutory prohibitions on the separate affiliate or joint venture receiving any type of services from any entity other than the Bell operating company and its subsidiaries.[21] As a result, consistent with the Act, Bell Atlantic Corporation or its centralized administrative support subsidiary, Bell Atlantic Network Services, Inc., could lawfully provide a variety of services to an electronic publishing separated affiliate or joint venture.

- Use of Name, Trademarks and Service Marks

The Act prohibits the separated affiliate or joint venture from using "the name, trademarks, or service marks of an existing Bell operating company except for names, trademarks, or service marks that are owned by the entity that owns or controls the Bell operating company."[22] As a result, Bell Atlantic's electronic publishing affiliate or joint venture may use, for example, the Bell Atlantic name and logo which is owned by Bell Atlantic Corporation, even though they are also used by the Bell Atlantic operating telephone companies. Time Warner tries to stand this provision on its head by arguing that the affiliate or joint venture is denied use of a name, trademark, or service mark that is owned by the parent if the Bell company also uses it.[23] That claim is obviously at odds with the clear statutory language quoted above and must be denied.

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[21] ***See*** NYNEX Comments at 10-18.

[22] 47 U.S.C. § 274(b)(6) (emphasis added).

[23] Time Warner at 16-17.

- Entry By Means Other than Separate Affiliate or Joint Venture

Time Warner ignores other statutory provisions as well. It argues that the Bell operating companies may enter the electronic publishing business only through separate affiliates or electronic publishing joint ventures.[24] The Act, however, allows the Bell company to engage in "teaming or business arrangements to engage in electronic publishing ... with any other electronic publisher."[25] It also allows the Bell companies to provide electronic publishing services that are not "disseminated by means of such Bell operating company's or any of its affiliates' basic telephone service."[26] Despite Time Warner's desires, the Commission cannot ignore these additional ways that Congress allowed the Bell companies to enter the electronic publishing business.

- Credit

Finally, the Commission should reject AT&T's attempts to inject additional provisions into the Act relating to credit. The Act prohibits an electronic publishing separated affiliate or joint venture from incurring debt in a manner that would give a creditor recourse to the assets of the Bell operating company.[27] AT&T argues that this also prohibits the affiliate or

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[24] ***Id.*** at 7-8.

[25] 47 U.S.C. § 274(c)(2)(B).

[26] 47 U.S.C. § 274(a).

[27] 47 U.S.C. § 274(b)(2).

joint venture from obtaining debt in a manner that gives recourse to the assets of the parent of the Bell company, such as the holding company.[28] Not only is this restriction inconsistent with the clear language of the Act, there is no policy justification for it. As AT&T points out, Congress wanted to protect the Bell companies' exchange service and access subscribers from bearing the cost of any default.[29] There is no basis, however, for AT&T's undocumented claim that Congress wanted to prevent an "unfair competitive advantage" by giving the electronic publishing entity access to lower credit costs through its affiliation with the Bell company's parent.[30] AT&T's proposal would put the Bell company's electronic publishing affiliate or joint venture at a significant competitive disadvantage vis-à-vis AT&T, or any other company whose own electronic publishing business may rely on the full credit of the parent corporation, and all affiliates, without restriction. By limiting the debt recourse provision to the Bell operating companies, Congress showed its intention not to give AT&T that sort of unfair advantage.

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[28] AT&T at 15-16.

[29] ***Id.*** at 15.

[30] ***Id.***

III. Telemessaging Services

- Nondiscrimination Requirements

The 1996 Act provides that an incumbent LEC "shall not prefer or discriminate in favor of its telemessaging service operations in its provision of telecommunications services."[31] Voice-Tel, however, asserts that this provision addresses much more than telecommunications services. For example, Voice-Tel claims that, if a LEC allows its own telemessaging services to locate facilities in a central office, it must allow others to do the same.[32] Voice-Tel is wrong. The Commission's Comparably Efficient Interconnection rules allow the Bell companies to locate their telemessaging processors in telephone company central offices, so long as all connections between those processors and the basic network are provided through generally-available telecommunications services at tariffed rates.[33] There is no basis for Voice-Tel's unsupported claim that Congress intended to change those provisions and, in fact, the Commission has recently reaffirmed that LECs are not required to offer collocation services for third parties' enhanced service equipment.[34]

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[31] 47 U.S.C. § 260(a)(2) (emphasis added).

[32] Comments of Voice-Tel at 5 ("Voice-Tel").

[33] ***See, e.g., Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)***, 104 F.C.C.2d 958, ¶¶ 167, 171-186 (1986).

[34] ***Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order***, CC Docket No. 96-98, FCC 96-325 at ¶ 581 (rel. Aug. 8, 1996).

Voice-Tel goes even farther, erroneously claiming that Section 260 "prohibits discrimination in every area and without regard to reasonableness."[35] It then contends that the Act prohibits the LECs from joint marketing their telemessaging services with their basic telecommunications service. With no statutory support or policy justification, Voice-Tel claims that Congress intended to deny the public the benefits of one-stop shopping. As Bell Atlantic has shown elsewhere, integrated provision of telecommunications and telemessaging services has served the public interest for nearly a decade and is a major factor in the immense growth of telemessaging services during that period, with no evidence of competitive harm.[36]

- Separate Affiliate

Voice-Tel then repeats its familiar refrain that LECs should offer telemessaging services only through a separate subsidiary.[37] Only interLATA telemessaging services, however, need be offered through a separate affiliate. As Bell Atlantic showed in the Section 271/272 non-accounting proceeding[38] and in the accounting safeguards proceeding,[39] a service is

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[35] Voice-Tel at 6.

[36] ***Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services***, CC Docket No. 95-20 ("Computer III Remand Proceeding"), Comments of Bell Atlantic at 7-10, 15-20, and Att. A (filed Apr. 7, 1995).

[37] Voice-Tel at 10.

[38] ***Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended***, CC Docket No. 96-149, Reply Comments of Bell Atlantic at 15-18 (filed Aug. 30, 1996).

[39] ***Accounting Safeguards Under the Telecommunications Act of 1996***, CC Docket No. 96-150, Reply Comments of Bell Atlantic at 8-9 (filed Sept. 10, 1996).

interLATA only if the LEC itself, through its owned or leased facilities, provides the underlying transport across LATA boundaries. But in the case of telemessaging services, the interLATA transport service is offered separately, and nothing in the statute changes the intraLATA nature of the telemessaging services themselves.

Other than its erroneous reading of the scope of Section 260, Voice-Tel provides no statutory basis for the list of conditions it proposes on LEC provision of intraLATA telemessaging services, including prohibiting all joint advertising or marketing and prohibiting use of LEC personnel to provide telemessaging services unless those same employees, are made available to non-affiliates.[40] As the record in the Computer Inquiry III Remand Proceeding demonstrates, the public is well served by the integrated provision of telemessaging services (and other enhanced services). Voice-Tel has provided no information to refute that comprehensive record and no statutory basis for its broad "nondiscrimination" claim.[41]

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[40] Voice-Tel at 10-11.

[41] AT&T asserts that a planned service by The Messaging Alliance, a limited partnership owned by four Bell companies, including Bell Atlantic, in some way violates the nondiscrimination provisions of Section 260. AT&T at 8, n.6. The proposed service would provide a database to support the provision of certain messaging services, such as the transmission of pre-recorded voice messages between the voice mail boxes of two or more end users. Competing messaging providers would be free to develop their own similar databases, and those databases would be accessed in the same manner as the Alliance's database, through generally-available and tariffed dial-up or dedicated lines. Therefore, there is no discrimination in the provision of telecommunications services and no violation of Section 260.

IV. Enforcement

The comments of three of the parties demonstrate precisely why the Commission should not adopt its proposal to shift the burden of proof in complaint proceedings involving telemessaging and alarm monitoring services.[42] ATSI, for example, asks the Commission to shift the burden whenever a telemessaging service provider claims that "a request for access to the incumbent's network has been made and that interconnection has not been accomplished,"[43] regardless of whether the request was for currently offered services, whether the particular request was technically feasible, or whether the requested interval was reasonable. Similarly, ATSI would shift the burden upon a mere allegation of a cost or quality differential or of "undue delay" in providing access.[44] AICC even wants to be relieved of the need to produce any pertinent information relating to alarm monitoring discrimination complaints before the burden shifts to the LEC.[45] And Voice-Tel would shift the burden to the LEC "to demonstrate that its actions do not have a negative financial impact on its competitors."[46]

These proposals show that shifting the burden of proof to the defendants would open the flood gates to litigious competitors to file frivolous complaints. Each would force

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[42] ***See Notice of Proposed Rulemaking***, FCC 96-310 at ¶ 79 (rel. July 18, 1996).

[43] Comments of the Association of Telemessaging Services International at 9 ("ATSI").

[44] ***Id.***

[45] Comments of the Alarm Industry Communications Committee at 29-30 ("AICC").

[46] Voice-Tel at 13. In that way, Voice-Tel would avoid the statutory mandate that any alleged violation that receives expedited consideration must "result in material financial harm to a provider of telemessaging service." 47 U.S.C. § 260(b).

LECs to attempt to prove negatives -- for example, lack of "undue" delay, unavailability of requested services, lack of financial harm to a third party, technical impossibility, or lack of quality differences -- upon the mere unsupported allegation by a complainant. Under the Commission's traditional complaint procedures, the complainant must at least come forward with some proof that a violation has occurred and (under the statutory standard) a showing of material harm before the LEC needs to proffer evidence to refute the allegations. If the burden were shifted, as the commentors' wish lists make clear, the LECs would forever find themselves defending unsupported claims, and the Commission would need to adjudicate all those frivolous allegations.

The Commission can expedite the complaint process by setting tight deadlines and requiring all pleadings, by complainants and defendants alike, to be complete and supported by probative evidence. If the complainant believes that additional evidence is needed from the defendant to prove its claim, it should be required to identify the needed material in the complaint. The defendant should then be required either to produce the material or raise any appropriate objections as part of the answer. The staff should be empowered to rule on such objections quickly.

In addition, the Commission should delegate authority to the staff to issue summary rulings dismissing complaints that are facially meritless or that fail to meet the statutory requirements. This power should be backed by the adoption and vigorous application of sanctions similar to those in Rule 11 of the Federal Rules of Civil Procedure. That rule specifies sanctions for submitting filings for "any improper purpose, such as to harass," that are

frivolous, or that have no evidentiary support.[47] Filing a complaint of the type that the parties here want to file, i.e., one that contains a mere allegation of discrimination, without evidentiary support, or one that fails to demonstrate material financial harm as required under the Act, would be subject to sanction under such provision. The Commission should not, however, open the door to such complaints by shifting the burden of proof.

[47] Rule 11(b), F.R.C.P. A copy of this rule is attached.

V. Conclusion

Accordingly, the Commission should deny the requests of a few parties to promulgate detailed and unnecessary rules, most of which are contrary to clear statutory provisions.

Respectfully Submitted,

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interlocutory appeal in admiralty cases which is provided by 28 U.S.C. § 1292(a)(3).

1970 Amendment

The reference to Rule 26(a) is deleted, in light of the transfer of that subdivision to Rule 30(a) and the elimination of the de bene esse procedure therefrom. See the Advisory Committee's note to Rule 30(a).

1987 Amendment

The amendment is technical. No substantive change is intended.

Rule 10. Form of Pleadings

(a) Caption; Names of Parties. Every pleading shall contain a caption setting forth the name of the court, the title of the action, the file number, and a designation as in Rule 7(a). In the complaint the title of the action shall include the names of all the parties, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties.

(b) Paragraphs; Separate Statements. All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.

(c) Adoption by Reference; Exhibits. Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.

ADVISORY COMMITTEE NOTES

1937 Adoption

The first sentence is derived in part from the opening statement of former Equity Rule 25 (Bill of Complaint—Contents). The remainder of the rule is an expansion in conformity with usual state provisions. For numbered paragraphs and separate statements, see Conn.Gen.Stat., 1930, § 5513; Smith-Hurd Ill.Stats. ch. 110, § 157(2); N.Y.R.C.P., (1937) Rule 90. For incorporation by reference, see N.Y.R.C.P., (1937) Rule 90. For written instruments as exhibits, see Smith-Hurd Ill.Stats. ch. 110, § 160.

Rule 11. Signing of Pleadings, Motions, and Other Papers; Representations to Court; Sanctions

(a) Signature. Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

(b) Representations to Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,—

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) How Initiated.

(A) By Motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in

presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(B) On Court's Initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(2) Nature of Sanction; Limitations. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) Order. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

(d) Inapplicability to Discovery. Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37.

(As amended Apr. 28, 1983, eff. Aug. 1, 1983; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993.)

ADVISORY COMMITTEE NOTES

1937 Adoption

This is substantially the content of [former] Equity Rules 24 (Signature of Counsel) and 21 (Scandal and Impertinence) consolidated and unified. Compare former Equity Rule 36 (Officers Before Whom Pleadings Verified). Compare to similar purposes, *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 19, r. 4, and *Great Australian Gold Mining Co. v. Martin*, L.R. 5 Ch.Div. 1, 10 (1877). Subscription of pleadings is required in many codes. 2 Minn.Stat. (Mason, 1927) § 9265; N.Y.R.C.P. (1937) Rule 91; 2 N.D.Comp.Laws Ann. (1913) § 7455.

This rule expressly continues any statute which requires a pleading to be verified or accompanied by an affidavit, such as: U.S.C., Title 28:

§ 381 [former] (Preliminary injunctions and temporary restraining orders)

§ 762 [now 1402] (Suit against the United States)

U.S.C., Title 28, § 829 [now 1927] (Costs; attorney liable for, when) is unaffected by this rule.

For complaints which must be verified under these rules, see Rules 23(b) (Secondary Action by Shareholders) and 65 (Injunctions).

For abolition of former rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances, see 12 P.S.Pa. § 1222; for the rule in equity itself, see *Greenfield v. Blumenthal*, C.C.A.3, 1934, 69 F.2d 294.

1983 Amendment

Since its original promulgation, Rule 11 has provided for the striking of pleadings and the imposition of disciplinary sanctions to check abuses in the signing of pleadings. Its provisions have always applied to motions and other papers by virtue of incorporation by reference in Rule 7(b)(2). The amendment and the addition of Rule 7(b)(3) expressly confirms this applicability.

Experience shows that in practice Rule 11 has not been effective in deterring abuses. See 6 Wright & Miller, *Federal Practice and Procedure: Civil* § 1334 (1971). There has been considerable confusion as to (1) the circumstances that should trigger striking a pleading or motion or taking disciplinary action, (2) the standard of conduct expected of attorneys who sign pleadings and motions, and (3) the range of available and appropriate sanctions. See Rodes, Ripple & Mooney, *Sanctions Imposable for Violations of the Federal Rules of Civil Procedure* 64–65, Federal Judicial Center (1981). The new language is intended to reduce the reluctance of courts to impose sanctions, see Moore, **Federal Practice** ¶ 7.05, at 1547, by emphasizing the responsibilities of the attorney and reenforcing those obligations by the imposition of sanctions.

The amended rule attempts to deal with the problem by building upon and expanding the equitable doctrine permitting the court to award expenses, including attorney's fees, to a litigant whose opponent acts in bad faith in instituting or conducting litigation. See, e.g., *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980); *Hall v. Cole*, 412 U.S. 1, 5 (1973). Greater attention by the district courts to pleading and motion abuses and the imposition of sanctions when appropriate, should discourage dilatory or abusive tactics and help to streamline the litigation process by lessening frivolous claims or defenses.

The expanded nature of the lawyer's certification in the fifth sentence of amended Rule 11 recognizes that the litigation process may be abused for purposes other than delay. See, e.g., *Browning Debenture Holders' Committee v. DASA Corp.*, 560 F.2d 1078 (2d Cir.1977).

The words "good ground to support" the pleading in the original rule were interpreted to have both factual and legal elements. See, e.g., *Heart Disease Research Foundation v. General Motors Corp.*, 15 Fed.R.Serv.2d 1517, 1519 (S.D.N.Y.1972). They have been replaced by a standard of conduct that is more focused.

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of September, 1996 a copy of the foregoing "Reply Comments of Bell Atlantic" was served on the parties on the attached list.

Tracey DeVaux

Tracey DeVaux

* Via hand delivery.

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